83-998

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1983

Civil No. _____

Foley Construction Company,
an Iowa Corporation,

Petitioner

vs.

U.S. Army Corps of Engineers,
an Agency of the United States of
America; The United States of
America; Col. Joseph F. Manzi,
Jr.; Herbison Construction Company,
a Minnesota Corporation; and
Herbison Bridge Company, a
Minnesota Corporation,

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

GEORGE W. PILLERS, JR., ESQUIRE
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Clinton, Iowa 52732
&
THOMAS D. McMILLEN, ESQUIRE
1900 Ingersoll Avenue
Des Moines, Iowa 50309

COUNSEL OF RECORD

QUESTIONS PRESENTED FOR REVIEW

(1)

Whether the Petitioner (Foley) was denied due process of law and equal protection of law under the 14th Amendment to U. S. Constitution, where it was denied an opportunity to appeal the Small Business Administration District Director's "size determination" because the Corps of Engineers prematurely awarded a government construction contract prior to Foley's receipt of the District Director's decision.

(2)

Whether the Corps' actions in hastily awarding the government construction contract to Herbison without allowing Foley an opportunity to appeal a size determination by the SBA District Director was "substantially justified" because of

the ambiguity and the Corps' confusion as to which federal regulatory scheme was governing the letting of Corps contracts, or whether the Corps' action was so hasty as to be unreasonable and inherently unfair to Foley, a legitimate bidder.

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an Agency of the United States of
America; The United States of
America; Col. Joseph F. Manzi,
Jr.; Herbison Construction Company,
a Minnesota Corporation; and
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Minnesota Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Foley Construction Company, the

Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on September 14, 1983.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 716 Fed. 2d 1202 (1983) and is printed in Appendix hereto, infra, pages 1-22. The judgment of the District Court is printed in Appendix hereto, infra, pages 11-16. The journal entry of judgment of the District Court is printed in Appendix hereto, infra, page 23,24.

JURISDICTION

The Decree and Judgment of the U. S. Court of Appeals of the Eighth Circuit (Appendix infra, pages 1-22) were filed September 14, 1983. The jurisdiction of the Supreme Court is invoked under 28 USC Section 1254(1) which provides that the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition

of judgment or decree.

STATUTE INVOLVED

28 USC Section 2412(d)(1)(A) except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any cost awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the Court finding that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT OF THE CASE

The U. S. Army Corps of Engineers (Corps) issued an invitation for bids on a flood protection levy to be built along the Mississippi River in Burlington, Iowa. The

invitation was limited to small businesses pursuant to theSmall Business Administration Set-Aside Program, which promotes the award of federal contracts to small business concerns. Herbison Construction Company (Herbison) submitted the low bid. The second low bidder was Foley Construction Company (Foley) Petitioner herein. Immediately after the bids were opened, Foley delivered, in writing, a timely protest to the Corps challenging Herbison as a qualified small business. Foley's principal claim was that Park Construction Company (Park) of Minneapolis, Minnesota was an 'affiliate' of Herbison thereby removing Herbison from the category of a small business concern. The Foley protest was forwarded to the SBA District Office in Chicago, Illinois for review. During the review process, the Corps suspended action on the contract. On

February 22, 1982, the SBA District Office ruled that Herbison met the requirements of the Small Business Set-Aside Regulations. By letter, dated February 22, 1982, the SBA District Director notified the Corps, Herbison and Foley of the determination. On February 23, 1982 and before Foley could notify him of an appeal, Colonel Manzi of the Corps awarded Herbison the contract. Immediately upon hearing of the SBA District Director's ruling, and only hours after Colonel Manzi awarded the contract to Herbison, Foley's counsel notified the Corps by phone that the size determination made by the SBA District Director would be appealed by the Plaintiff.

On March 10, 1982, Foley brought action in the U. S. District Court for the Southern District of Iowa seeking to enjoin the Corps and Herbison from proceeding under the contract. Foley claimed to be

within the zone of interests to be protected by the SBA statute. On March 12, 1982, the District Court entered a Temporary Restraining Order in favor of the Plaintiff until such time as the appeal of the SBA District Director's determination could be ruled upon by the Size Appeal Board in Washington, D.C. An extension of the Temporary Restraining Order was granted to the Plaintiff on March 19, 1982. On April 1, 1982, the Court entered a preliminary injunction in favor of Foley, which was modified on April 12, 1982. On April 14, 1982, Foley filed a bond of $20,000.00 with the Clerk of Court in accordance with the modified preliminary injunction.

On April 19, 1982, the Size Appeal Board ruled that the Herbison Construction Company was "other than small business for award of IFB DACW 25-82-B-0007". On April

28, 1982, a hearing on the permanent injunction was held before the District Court at which time Foley requested that the Court enter a permanent injunction and that Foley be awarded the contract.

On May 7, 1982, the District Court granted Foley's motion for a permanent injunction against Herbison and the Corps, and ordered the Corps to award the levy project contract to Foley. In conformity with the Court's Order, the Corps then issued the contract to Foley.

Neither Herbison nor the Corps appealed the District Court's permanent injunction, findings of fact or its order requiring the Corps to award the contract to Foley. Thirty days after judgment had been entered, Foley filed an application for legal fees and expenses pursuant to 28 USC Section 2412(d)(1)(A) (EAJA). The District Court denied the application for

attorneys' fees holding that although Foley was the "prevailing party" the Government's position was substantially justified. Thereafter, Foley appealed to the United States Court of Appeals for the Eighth Circuit, which Court sustained the District Court's decision specifically finding that the actions of the Government were not unreasonable and were, therefore, substantially justified.

ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI

This Court has not considered or addressed the language of the statute involved in this litigation. The Equal Access to Justice Act (EAJA) became effective October 1, 1981. Several circuits have considered the language of EAJA with varying interpretations of the language "substantially justified", and what special circumstances make an award unjust. It is in the best interest of

justice for the Supreme Court to clarify and establish guidelines for interpretation of that language. This case presents a unique opportunity for the Court to review EAJA in light of the uncontested findings of fact of the District Court. Unfortunately, the Circuit Court of Appeals failed to address or examine the following questions: (a) whether the action of the Corps representative was "substantially justified" where he failed to afford a bidder the opportunity to give notice of appeal of the SBA District Director's decision to the Size Appeal Board, and (b) whether Foley's constitutional rights were violated when Foley was not afford an opportunity to appeal the SBA District Director's decision before the contract was awarded.

When the Circuit Court of Appeals applied the test of "reasonableness," its

application was too narrow. The Circuit Court only sought an answer to the question: Was the Corps reasonable in defending its actions in light of ambiguous federal regulations. Clearly, the test applied to the government's action was one of interpretation of the law rather than an analysis of the factual events leading to the application of the appropriate regulatory scheme. In other words, whichever federal regulations the Corps chose to apply it had a duty to apply those regulations "fairly" and in accordance with the spirit of the SBA Act.

The legislative history of the EAJA, enunciates that the standard to be applied by a Court when interpreting the term "substantially justified" is one of reasonableness:

> The test of whether or not a government action is substantially justified is essentially one of

reasonableness. Where the government can show that its case had a reasonable basis both in law and in fact, no award will be made. (Emphasis added)

1980 U. S. Code Cong. & Ad. News, p. 4989;
S. REP. No. 96-253 96th Cong. 1st Ses. (1979) at 6
See, also: S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm., et al. 672 F.2d 426, 430 (5th Cir. 1982).

This is more amply shown in Justice Fagg's opinion at Appendix page 17, in the following language:

Throughout this litigation the government has consistently contended that the appropriate regulations to be examined are the Armed Services Procurement Regulations, 32 CFR Sections 1-100 et seq. Although the district court found that these regulations were not applicable to this case, we believe it was reasonable for the government to contend that the regulations did apply.... Moreover, these regulations clearly provide a reasonable basis for the government's position.

Foley does not dispute either the reasonableness or the right of the government to differ in its opinion

regarding which regulations should govern the appropriate regulatory scheme. This, however, is not Foley's basis for claiming that the government's actions were not justified.

The crux of Foley's argument is that the government cannot claim that its actions were either "justified" or "substantially justified" where the acts of its servant had "no rational basis", were "clearly illegal" and were "fundamentally unfair" to Foley, and thus constituting a "clear violation of his duty". (Appendix page 62).

On May 7, 1982, the Honorable Donald E. O'Brien entered his Findings of Fact and Order for the U. S. District Court in this matter. The Findings of Fact, as found by the District Court, were not appealed by any of the parties to this litigation. Therefore all subsequent appeals should be

bound by the findings made by the District Court. The District Court made it unequivocally clear that after the SBA District Director issued his decision on February 22, 1982, Colonel Manzi awarded the contract to Herbison before Foley could notify him of an appeal. See the District Court's Findings of Fact at page 2 (Appendix pages 38,39)

> On February 23, 1982, the last day to accept Herbison's bid, and before Foley could notify him of an appeal, Colonel Manzi awarded Herbison the contract (Defendant's Exhibit J). Immediately upon hearing the District Director's ruling, and only hours after Colonel Manzi awarded the contract to Herbison, plaintiff's counsel notified the Corps by phone that the size determination made by the SBA District Director would be appealed by plaintiff.

The District Court, after discussing a possible alternative of Colonel Manzi to declare an emergency, finds that no such emergency existed and, that, in light thereof, Colonel Manzi's urgency to award

the contract was not rational. District Court's opinion, page 11 (Appendix, page 55).

> Therefore, the failure to suspend further contracting action was a clear violation of Colonel Manzi's duty, and the award, absent a finding of urgency, was not rationally based.

And on page 12, (Appendix page 57) in the following language:

> Clearly, then, the evidence shows that the time of commencement of the contract has not been a crucial factor and will not be such a factor until approximately May 9, 1982 because the City Engineer had said no work could have been performed before this date either with or without the issuance of a Temporary Restraining Order and preliminary injunction by the Court.

The District Court addressed the issue of inherent fairness to Foley on page 14 of its opinion, (Appendix page 61).

> As previously stated, the Court finds that the ward of the contract to Herbison immediately after the ruling of the District Director, and before Foley was notified of the ruling, was not "fair". Further,

> all future action until the ruling of the Size Appeal Board of the SBA was not only unfair, but illegal and in violation of the regulations. (Emphasis added)

The concept of rule by law is to afford litigants basic and fundamental fairness. In this case, Colonel Manzi chose not to afford one of the bidders to the project (Foley) an opportunity to appeal the decision of the SBA District Director by issuing the award to Herbison prior to notification to Foley of the SBA District Director's size determination decision. While it is clear that the litigants may argue the applicability of the various regulatory schemes, it is equally clear that both schemes were developed to afford all parties a basic opportunity to represent their positions and fairly resolve questions of bidder qualification. Where a party to the [illegible] process has been denied, the opportunity to

perfect an appeal or review an administrative decision by the hasty and arbitrary action of a governmental official, such conduct constitutes a basic and fundamentally unfair violation of equal protection of the laws under the 14th Amendment of the United States Constitution. At no point in the proceedings, has the government sought to explain or offer substantiation for Colonel Manzi's irrational, arbitrary and expeditious awarding of the contract to Herbison. The record is void of any explanation why Colonel Manzi chose to award the contract within hours of receiving the District Director's decision and could not wait twenty-four hours or contact Foley and notify him of his impending actions. It is abundantly clear from the District Court's findings that no real urgency or necessity required the

issuance of the contract within a few hours of receipt of the SBA District Director's decision. See the District Court's opinion at page 7, (Appendix page 46) where Judge O'Brien states:

> The contracting officer herein, Colonel Manzi, however, did not declare that there was any type of emergency or that delay would be disadvantageous to the government. In fact, at the hearing of March 25, 1982, Colonel Manzi testified that there was no public exigency and that he did not have to act with "great dispatch".

Furthermore, had there been any type of urgency or emergency, both regulatory schemes raised by the litigants, provided adequate protection to the government for proceeding with the issuance of the contract expeditiously, upon certain findings and circumstances. This, however, was not the case. Foley's protest from the beginning has been thwarted and rejected and the Corps resented the disruption.

EAJA finds its basis in the concept that those citizens who have neither the financial nor political strength to challenge the government should be encouraged to adjudicate what they perceive to be arbitrary and inequitable actions on the part of governmental servants with the realistic anticipation of cost recovery. This concept is further buttressed because individuals and small businesses cannot afford the expense of extensive litigation, nor can they as readily garner the expertise as can the government in litigating claims. This principle was enunciated in Photodata, Inc. vs. Sawyer, 533 F. Supp. 348 (D.C.) at page 352:

> In order to insure even-handedness the government must scrutinize not only the government's theory in defending the legal issues raised but also the occurrences that impelled Plaintiff to bring this action.

It is not the questioned applicable regulatory scheme which makes the government's actions unreasonable, but rather the government proceeding to defend what the District Court found to be clearly both "unfair" and "illegal" acts of its servant, Colonel Manzi. If a governmental servant can unilaterally act to deny a right of appeal or deny a qualified bidder the right to challenge the qualifications of another bidder by "rushing to judgment" in the issuance of an award, then the language "substantially justified" fails to have the meaning offered by the legislative intent and Congressional history of the act. Such interpretations encourage governmental servants to deal unfairly with the private sector to accomplish their own personal desires, seek to deny the applicability of the appropriate federal regulatory scheme, and deny equal

protection of the laws to citizens of the United States.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully Submitted,

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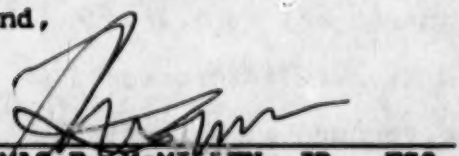
and,



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1900 Ingersoll Avenue
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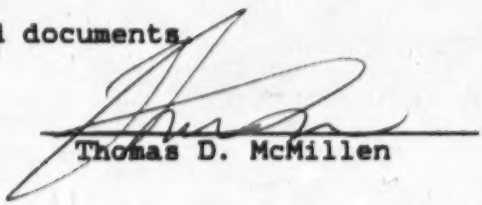
Des Moines, IA 50309

NOTARIZED STATEMENT OF FILING

STATE OF IOWA)
)ss
COUNTY OF CLINTON)

I, Thomas D. McMillen, being first duly sworn on oath depose and state that I am a member of the Bar of the Supreme Court of the United States, that I did on the 13 day of December, 1983, deposit in the United States Post Office in Des Moines, Iowa, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, Supreme Court Building, 1 - First Street, N.E., Washington, D.C., 20543, within the time allowed for filing, forty copies of the attached Petition for Writ of Certiorari and Appendix, Entry of Appearance, docketing fee, and Certificate of Service of said Petition and Appendix on interested parties, and that to my knowledge said mailing took place on the 13 day of

December, 1983, within the time permitted for filing said documents.



Thomas D. McMillen

Subscribed and sworn to before me this 13 day of December, 1983, by the said Thomas D. McMillen.

NOTARY PUBLIC IN AND FOR THE STATE OF IOWA.

CERTIFICATE OF SERVICE

I, Thomas D. McMillen, a member of the Bar of the Supreme Court of the United States and counsel of record for Foley Construction Company, Petitioner herein, hereby certify that on December 13, 1983, pursuant to Rule 28.5(b), Rules of the Supreme Court, I served three (3) copies of

the attached Petition for Writ of Certiorari and Appendix on each of the parties herein, as follows:

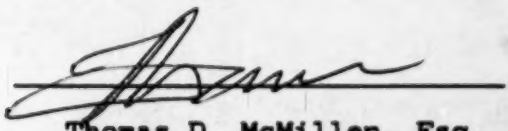
On the United States of America, Respondent herein, by depositing such copies in the United States Post Office, Des Moines, Iowa, with first-class postage pre-paid, properly addressed to the post office address of the Solicitor General of the United States and Richard A. Olderman, Appellate Staff, Department of Justice, the above-named Respondent's counsel of record, at: Solicitor General, Department of Justice, Washington, D.C. 20530 and Richard A. Olderman, Appellate Staff, Civil Division, Department of Justice, Washington, D.C. 20530.

On U. S. Army Corps of Engineers, an agency of the United States of America, Respondent herein, by depositing such copies in the United States Post Office,

Des Moines, Iowa, with first-class postage prepaid, properly addressed to the post office address of Richard C. Turner, United States Attorney, the above named Respondent's counsel of record at U. S. Court Building, Des Moines, Iowa, 50309.

All parties required to be served have been served.

Dated December 13, 1983.



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IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1983

NO. _____

Foley Construction Company,
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vs.

U.S. Army Corps of Engineers,
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America; Col. Joseph F. Manzi,
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Herbison Bridge Company, a
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Respondents

APPENDIX

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COUNSEL OF RECORD

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2202

Foley Construction Company,
an Iowa Corporation,

Appellant

v.

U.S. Army Corps of Engineers,
an Agency of the United States of
America; The United States of
America; Col. Joseph F. Manzi,
Jr.; Herbison Construction Company,
A Minnesota Corporation; and
Herbison Bridge Company, a
Minnesota Corporation,

Appellees

Appeal from the United
States District Court
for the Southern District
of Iowa

Submitted: May 20, 1983

Filed: September 14, 1983

Before LAY, Chief Judge, and HEANEY and
FAGG, Circuit Judges.

FAGG, Circuit Judge.

Foley Construction Company, the prevailing party in an action brought against the United States Army Corps of Engineers, seeks an award of attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. Section 2412. The district court denied attorneys' fees because it held that the government's position was "substantially justified." We affirm.

I. BACKGROUND

This litigation stems from the award of a construction contract in which Foley was an unsuccessful bidder. The Corps issued an invitation for bids on a flood protection levee to be built along the Mississippi River in Burlington, Iowa. The invitation was limited to small businesses pursuant to the Small Business

Administration set-aside program, which promotes the award of federal contracts to small business concerns. Herbison Construction Company submitted the lowest bid. The second lowest bid was submitted by Foley.

Foley delivered in writing a timely protest to the Corps that Herbison did not qualify as a small business. The Corps suspended action on the contract and forwarded the protest to the SBA district office which ruled that Herbison was a small business. After the district office ruled, the Corps awarded the contract to Herbison. Foley then notified the Corps that it intended to appeal the decision of the SBA district office to the SBA Size Appeals Board and it brought an action in federal district court seeking to enjoin the Corps from proceeding under the contract with Herbison.

The district court issued a temporary restraining order, and later a preliminary injunction, enjoining the Corps from proceeding under the construction contract until the Size Appeals Board had ruled on Foley's appeal. The Size Appeals Board ruled that Herbison was not a small business, reversing the decision of its district office. The district court then permanently enjoined the Corps from proceeding with the contract with Herbison and ordered the Corps to award the contract to Foley. Thirty days after judgment had been entered, Foley filed an application for legal fees and expenses of $27,444.23 pursuant to the EAJA. The district court denied the application for attorneys' fees because it held that although Foley was the "prevailing party," the government's position was substantially justified.

II. EQUAL ACCESS TO JUSTICE ACT

The Equal Access to Justice Act, 28 U.S.C. Section 2412, enacted by Congress in 1980, provides for attorneys' fees in suits by or against the United States under certain limited circumstances. The purpose of the EAJA is to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5-6 (1980). In this case, Foley claims attorneys' fees under 28 U.S.C. Section 2412(d)(1)(A):

> (A) court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the

position of the United States was substantially justified * * *.

There is no question that Foley was the "prevailing party" in this litigation. The only dispute in this appeal is whether the position of the United States was substantially justified. The legislative history is helpful in interpreting the substantially justified standard. The House Committee report on the EAJA states:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and in fact, no award will be made. . . .
>
> The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.

H.R. Rep. No. 1418, supra, at 10-11. Although the committee report is strong evidence that a reasonableness standard should be applied, we must also consider that the Senate Judiciary Committee rejected an amendment to the EAJA that would have changed the language of the bill from "substantially justified" to "reasonably justified." S. Rep. No. 253, 96th Cong., 1st Sess. 8 (1979).

The courts of appeals have generally been in agreement that substantial justification is essentially a test of reasonableness. Dougherty v. Lehman, Nos. 82-1360, 82-1418 (3d Cir. June 30, 1983) (available August 12, 1983, on Westlaw); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983); Broad Avenue Laundry & Tailoring, 693 F.2d 1387, 1391 (Fed. Cir. 1982); Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982);

S & H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426, 430 (5th Cir. 1982). The District of Columbia Circuit has stated that a standard based on the bounds of reasonableness is appropriate in most cases. For "borderline cases," however, it has developed more particularized criteria, including the clarity of the governing law, the foreseeable length and complexity of the litigation, and the consistency of the government's position. Spencer v. NLRB, No. 82-1851, slip op. at 37-46 (D.C. Cir. June 28, 1983). This court appeared to adopt a reasonableness standard in United States for Heydt v. Citizens State Bank, 668 F.2d 444 (8th Cir. 1982). In that case, a taxpayer had prevailed in reducing the scope of an IRS summons, but the district court's denial of attorneys' fees was affirmed because the district court found that the summons

had been issued in good faith and for a proper purpose. Id. at 448.

In this case, the district court employed a reasonableness test, and that standard has not been challenged by either party on appeal. We now hold that the test of whether the position of the United States is substantially justified is essentially one of reasonableness in law and in fact. The government bears the burden of proving the substantial justification of its position. See H.R. Rep. No. 1418, supra, at 10-11. See also Dougherty v. Lehman, supra; Spencer v. NLRB, supra, slip op. at 37; S & H Riggers & Erectors, Inc. v. OSHRC, supra, 672 F. 2d at 430; United States for Heydt v. Citizens State Bank, supra, 668 F.2d at 448.

The EAJA does not state which government position must be substantially

justified. Several courts have examined the government's litigation position to determine its substantial justification. See, e.g., Spencer v. NLRB, supra, slip op. at 36; Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982); Broad Avenue Laundry and Tailoring v. United States, supra, 693 F.2d at 1390-91. See also S & H Riggers & Erectors Inc. v. OSHRC, supra, 672 F.2d at 430. The Third Circuit has concluded that the government position referred to is not the litigation position, but the agency action which made it necessary for a party to file suit. Natural Resources Defense Council v. U.S.E.P.A., 703 F.2d 700, 707 (3d Cir. 1983). In most cases "it makes no functional difference how one conceives of the government's 'position'" because "the litigation position of the United States will almost always be that its underlying

action was legally justifiable." Spencer v. NLRB, supra, slip op. at 25-26 (footnotes omitted).

The district court examined the government's position in litigation. The government has agreed with that assessment and Foley has not challenged the issue on appeal. Indeed, in its brief, Foley has framed the issue as follows: "Whether the United States Army Corps of Engineers was substantially justified in defending this action (emphasis added)." Foley concludes its brief by stating that "the Government's defense of (the) injunction action was not reasonable and cannot be substantially justified (emphasis added)." Given the way in which the parties have framed the issue on appeal, we will assume, for the purpose of this case, that "position of the United States" refers to the government's position in litigation.

III. ANALYSIS

The issue that this court must decide is whether it was reasonable for the government to defend the Corps' actions in initially awarding the contract to Herbison and then proceeding with the contract after it received notice that Foley intended to appeal the decision of the SBA district office. The district court held that the Corps' "award and failure to suspend further contracting action were clearly illegal acts * * * ." (Clear illegality is the standard imposed upon an unsuccessful bidder seeking judicial relief. See Sea-Land Service, Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979).) This determination on the merits has not been appealed. The mere fact that the government lost its case, however, does not mean that its position was unreasonable and that attorneys fees

and costs should be awarded to the prevailing party. The question is whether it was reasonable for the government to defend on the premise that its actions were not "clearly illegal."

At the outset, it is important to acknowledge the interest of the government and the public in a procurement process unfettered by delay. See Allis-Chalmers Corp., Hydro-Turbine Division v. Friedkin, 635 F.2d 248, 252-53 (3d Cir. 1980); M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1303, 1306 (D.C. Cir. 1971). In recognition of this interest, government agencies have generally been afforded broad discretion in making procurement decisions and in interpreting procurement regulations. Allis-Chalmers Corp., Hydro-Turbine Division v. Friedkin, supra, 635 F.2d at 252-53; Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1270-72 (5th Cir. 1978). In this case, to determine

whether the Corps could award and proceed with the contract after the decision of the SBA district office, the parties turned to a complex maze of government procurement regulations. Some of the regulations appear to conflict; some are susceptible of more than one interpretation. With no clear guide for it to follow, we believe the government adopted a course consistent with its purposes and reasonably supported by the regulations.

The district court applied the Federal Procurement Regulations, 41 C.F.R. Section 1-1.000 et seq., which provide that upon receipt of a protest concerning small business status, procurement is to be suspended "pending SBA's determination of the status of the protested bidder," or until a ten-day period has expired. 41 C.F.R. Section 1-1.703-2(e). The district court interpreted the regulation

to require that the contracting officer suspend procurement activity until the SBA had finally adjudicated the dispute. In this case, that meant that procurement was to be suspended until the Size Appeals Board had ruled. The government has argued reasonably, however, that the regulation requires suspension of procurement activity only until the SBA district office has ruled. Arguably, the regulations specifically contemplate a situation in which an award has been made following an initial SBA determination but prior to notice of appeal to the Size Appeals Board: "If an award has been made prior to the time the contracting officer receives notice of the appeal, the contract awarded shall be presumed to be valid and any determination rendered by SBA concerning the small business status of the concern involved shall be

considered in future procurements." 41 C.F.R. Section 1-1.703-2(d). First, this regulation suggests that the contracting officer had authority to award the contract after the decision of the SBA district office was rendered. Second, this regulation establishes that once the contract was awarded, it was reasonable for the government to proceed with the contract since the regulation states that such a contract is "presumed to be valid." This has been interpreted to be a conclusive, not a rebuttable, presumption. Mid-West Construction, Ltd. v. United States, 387 F.2d 957, 963 (Ct. Cl. 1967).

Foley chose to rely upon different language in the regulations, which contemplates that an award can be made pending SBA's determination, but only if "unusual conditions make it necessary that an award be made." 41 C.F.R. Section 1-1.703-2(e). Foley argued, and the district

court agreed, that because the contracting officer had not made a determination that unusual circumstances were present which made further delay disadvantageous to the government, the Corps could not award or proceed with the contract until the final decision of the SBA had been reached. We are not required to determine which interpretation of the regulations was correct. It is enough for the purpose of this case to conclude that both Foley and the Corps interpreted disaccordant regulations in a reasonable manner.

Throughout this litigation the government has consistently contended that the appropriate regulations to be examined are the Armed Services Procurement Regulations, 32 C.F.R. Section 1-100 et seq. Although the district court found that these regulations were not applicable

to this case, we believe it was reasonable for the government to contend that the regulations did apply. See 32 C.F.R. Section 1-102 (Armed Services Procurement Regulations specifically made applicable to Department of Defense); compare 41 C.F.R. Section 1-1.004 (Federal Procurement Regulations not made mandatory on Department of Defense). Moreover, these regulations clearly provide a reasonable basis for the government's position. 32 C.F.R. Section 1-703(b)(3) specifically states that an award made after the ruling of the SBA district office and before the contracting officer has received notice of an appeal is valid:

> The SBA District Director will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of his determination, and award may be made on the basis of that determination. This determination is final unless it is appealed in

> accordance with (4) below, and the contracting officer is notified of the appeal prior to award. If an award was made prior to the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid (emphasis added).

Additionally, 32 C.F.R. Section 1-703(b)(3)(ii) provides that after the SBA district director has ruled on a bidder's small business status, contract procurement is further suspended only if an appeal is taken to the Size Appeals Board and if the contracting officer is notified of the appeal prior to the contract award. Given these regulations, the government's position in this case, in which the contracting officer was not notified of the appeal prior to the award, was reasonable.

Finally, it was reasonable for the Corps to conclude that even if its initial award to Herbison were later ruled

improper, it could nevertheless proceed with the contract. Courts have held that the government cannot rescind a validly awarded small business set-aside contract where the successful bidder is later declared not to be a small business. Allen M. Campbell Co. v. United States, 467 F.2d 931, 931 (Ct. Cl. 1972); Mid-West Construction Ltd. v. United States, supra, 387 F.2d at 963. Moreover, the Corps reasonably argued that Foley should not be awarded the contract because no particular party is entitled to the award of a contract. See Sea-Land Service, Inc. v. Brown, supra, 600 F.2d at 432; Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970). There was support for the Corps' position that even if Foley had been wronged, it had

an adequate remedy at law. In Iconco v. Jensen Construction Co., 622 F.2d 1291 (8th Cir. 1980), this court allowed an unsuccessful bidder on a small business set-aside contract let by the Corps to sue the successful bidder for unjust enrichment. Finally, an unsuccessful bidder can sue the United States for its bid preparation and proposal costs. See, e.g., Lincoln Services, Ltd. v. United States, 678 F.2d 157, 158 (Ct. Cl. 1982); Cincinnatti Electronics Corp. v. Kleppe, supra, 509 F.2d at 1089.

In sum, this is not the type of case to which the EAJA was intended to apply; there was no unreasonable government action involved. The government interpreted a group of facially conflicting regulations in a reasonable manner and the Corps' underlying interpretation of the regulations has been the framework

for the government's defense in this litigation. "Whether the position the United States took in the litigation was substantially justified because it was reasonable depends upon all the pertinent facts of the case. Fixed rules cannot be established for determing this issue." Broad Avenue Laundry and Tailoring v. United States, supra, 693 F.2d at 1391. Considering all the pertinent facts in this case, we conclude that the government's position in litigation, although later rules incorrect, was substantially justified. Accordingly, the order of the district court denying fees and costs to Foley is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

On September 3, 1982 the following Judgment was entered in the United States District Court:

JUDGMENT ON DECISION BY THE COURT

FOR THE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FOLEY CONSTUCTION COMPANY,
an Iowa Corporation,

Plaintiff,

v.

U. S. ARMY CORPS OF ENGINNERS,
et al.,

Defendants

Civil Action Docket No. 82-46-D-2

JUDGMENT

This action came on for trial (hearing) before the Court, United States District Judge Donald E. O'Brien, presiding. The issues having been duly (heard) and a decision having been duly rendered,

it is ordered and adjudged..... that Herbison Construction Company shall have judgment as against Foley Construction Company in the sum of Seven Thousand Eight Hundred Seventy-four Dollars and Eighty-eight Cents ($7,874.88) as legitimate costs for the transportation of equipment from Minnesota to the job site in Iowa and return.

IT IS FURTHER ORDERED that the plaintiff's application for attorney fees as aginast the U.S. Army Corps of Engineers and/or the United States of America shall be and is hereby denied.

Dated at Davenport, Iowa

Dated: September 3, 1982

James R. Rosenbaum

Clerk of Court

by: Deputy Clerk

On September 1, 1982 the following Order was filed in the United States District Court for the Southern District of Iowa, Davenport Division.

FOLEY CONSTRUCTION COMPANY,

Plaintiff,

vs.

U. S. ARMY CORPS OF ENGINEERS, et al.,

Defendants.

Civil No. 82-46-D-2

ORDER

This matter comes before the Court on the motion by Herbison Construction Company to recover certain expenses and a motion by Foley Construction Company for attorney fees under the Equal Access to Justice Act, 28 U.S.C. Section 2412(d).

The Court finds that the defendant Herbison, by reason of an agreement of the

parties and previous order of this Court, is entitled to recover certain of its expenses as will be set out specifically below. The Court further finds that Foley Construction Company's application for attorney fees should be denied.

On March 12, 1982, during the temporary restraining order hearing, Foley Construction Company agreed, after inquiry by the Court, that as a condition to Foley's obtaining a temporary restraining order at that time, Foley would, if it became the prevailing party in this cause, reimburse Herbison Construction Company for certain costs of transportation. The Court, in reading the transcript of said hearing, finds that Mr. Olson of the Herbison Company testified on page 15 of said transcript that in order to move the three pieces of heavy equipment from Minnesota into Wisconsin and then into Iowa

would entail a cost of $1,400 for each piece of equipment, or a total of $4,200 for moving said equipment. This estimate was made by Mr. Olson, who has been in this business for a number of years and the person who, in effect, had been the successful bidder on the original project. The Court at that time did not go into the matter of incidental costs, nor did the Court consider any escort service required by Iowa law. The Court feels that it is equitable to hold the Herbison Company to the testimony of Mr. Olson, a longtime former employee and, as mentioned above, the then successful bidder on the project. However, the Court feels that the services of Linn's Escort Service, as required by Iowa law, was necessary under the circumstances and that Herbison Construction Company therefore is entitled to the sum of $1,715.82 for the trip to

Iowa and the trip back to Minnesota, said amount being charged for each one-way trip. The Court further feels that the necessary expenses of moving permits in the amount of $72.00 and Iowa moving permits in the amount of $51.00 and motel costs for three drivers in the amount of $120.24 are fair and reasonable amounts which should be charged to Foley Construction Company under the agreement in this record.

The total of these figures is by Foley Construction Company to Herbison Construction Company.

Herbison Construction Company also has a claim for idled equipment damages. In their memorandum in support of their motion, they set out the idled equipment costs are fifty percent of $2,552.00 per day for 57 days for a total cost of $72,732.00. Herbison Construction Company alleges that there was an agreement by

Foley Construction Company to pay these costs. The Court did not recall any such agreement and Foley specifically denied it. A reading of the transcript concerning these matters does not provide the answer. There is a discussion of this situation on page 15 of the transcript, where Mr. Hanson, attorney for Herbison, says that under a construction contract, a subcontractor with heavy equipment is entitled to fair rental for that equipment and the common standard used by the Highway Department and others is roughly fifty percent of the operating rental rate for heavy equipment. At that time, Mr. Olson estimated that that reasonable rental value for the three items of equipment would be roughly $10,000.00 a month. The record does not show any agreement as to the payment of this idled equipment, and, as mentioned above, Foley specifically denies

any such agreement. The Court feels that the Herbison Construction Company is not entitled to any idled equipment reimbursement for the following reasons: First, the transcript discloses that the equipment was in Minnesota, and if it had not been moved at the time it was moved, it would have had to stay in Minnesota and keep off Minnesota roads for a period estimated to be three or four weeks. Certainly if the equipment had not been moved, Herbison would not be entitled to idled equipment time for that equipment during that period. Second, this Court has found that the combination of Herbison Construction Company and the Park Construction Company had improperly held themselves out to have been qualified bidders for this Small Business set aside contract, and they are not entitled to idled equipment time for the period it took

to settle this matter in the courts.

The plaintiff, Foley Construction Company, has in fact prevailed in this lawsuit and, under ordinary circumstances, as a prevailing party, might well be entitled to attorney fees. During the arguments on these motions, all parties agreed that Foley Construction Company had no claim for attorney fees as against any of the defendants except the United States Corps of Engineers and/or the United States of America. Foley was asking the Court to award attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. Section 2412(d). This is a new section and there is not a great deal of law yet in relation to said section.

It is apparent from the legislative history of the Equal Access to Justice Act and the sparse case law interpreting that Act that Congress did not intend to create

any presumption in favor of an award of attorney fees simply because the Government did not prevail at the trial.

In S & H Riggers and Erectors, Inc. v. OSHRC, 672 F.2d 426 (5th Cir. 1982), the Fifth Circuit Court of Appeals referred to the House and Senate Judiciary Committee reports, and observed that:

> The standard...should not be read to raise a presumption that the government's position was not substantially justified, simply because it lost the case. Nor in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing:

The same Court went on to say:

> The test of whether or not a government action is substantially justified is essentially one of reasonableness where the government can show that its case had a reasonable basis both in law and in fact, no award will be made.

Without going into the various regulations of the Corps of Engineers and

the Small Business Administration, it is clear to this Court that where the SBA had initially ruled in favor of Herbison's Construction Company and found that they were a qualified Small Business bidder for this set aside project, that that alone would require the Government to proceed through the appellate process and to the courts, if necessary, to finally establish the result in this cause.

This Court finds that the plaintiff, Foley, is not entitled to an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. Section 2412(d), as no such fees are warranted in this case.

For good cause shown,

IT IS HEREBY ORDERED that Herbison Construction Company shall have judgment as against Foley Construction Company in the sum of $7,874.88 as legitimate costs for the transportation of equipment from

Minnesota to the job site in Iowa and return.

IT IS FURTHER HEREBY ORDERED that the plaintiff's application for attorney fees as against the U. S. Army Corps of Engineers and/or the United States of America shall be and is hereby denied.

Dated this 31st day of August, 1982.

/s/ Donald E. O'Brien

Donald E. O'Brien, JUDGE
UNITED STATES DISTRICT COURT

On May 7, 1982, the following Order was filed in the United States District Court for the Southern District of Iowa.

FOLEY CONSTRUCTION COMPANY, an Iowa Corporation,

Plaintiff

vs.

U. S. ARMY CORPS OF ENGINEERS, et al.,

Defendants.

Civil No. 82-46-D-2

O R D E R*

I. CHRONOLOGY OF EVENTS

On November 10, 1981, the United States Army Corps of Engineers ("Corps") issued Invitation for Bid No. DACW25-82-B-0007 (Plaintiff's Exhibit No. 1) to obtain bids for a local flood protection project on the Mississippi River in Burlington, Iowa. The invitation to bid was limited to

Program, with only those businesses having less than $12,000,000.00 per year average annual receipts for the last three years eligible for award. On December 15, 1981, the Corps opened the bids on the project. The low bidder was Herbison Construction Company ("Herbison") with a bid of $2,465,676.38.

On December 16, 1981, plaintiff, Foley Construction Company ("Foley"), who was the second low bidder on the project with a bid of $2,496,000.00, filed a written protest with the Corps. Foley claimed that Herbison did not qualify as a small business under the Set Aside Program, andprotested an award to Herbison. While the written protest appears to have alternate grounds, Foley's principal claim is that Park Construction is an "affiliate" of Herbison, thus including receipts of Park with Herbison's in determining small business

status.

Colonel Joseph F. Manzi, Jr., the contracting officer, forwarded the protest record to the Small Business Administration ("SBA") district office in Chicago on January 1, 1982, and the SBA advised Herbison that its small business status was under review (Defendant's Exhibit B). Thereafter the SBA requested that Herbison submit information so that the SBA could determine Herbison's status, and Herbison supplied all requested information, including a letter explaining Herbison's relationship with its alleged affiliate, Park Construction Company ("Park"). See Defendant's Exhibits C, D, and E.

Because Foley protested Herbison's status as a small business, Colonel Manzi delayed the award of the contract to Herbison. Pursuant to the invitation for bids, Herbison's bid was due to expire on

February 13, 1982. When the SBA had not made a determination by February 10, 1982, Herbison was requested to and did extend its bid to February 23, 1982 (Defendant's Exhibit F).

On February 22, 1982, one day before Herbison's bid would expire, the SBA District Director determined Herbison met all requirements of the Small Business Set Aside Regulations. By letter dated February 22, 1982, the SBA District Director notified the Corps, Herbison and Foley of the determination (Defendant's Exhibits G, H and I).

On February 23, 1982, the last day to accept Herbison's bid, and before Foley could notify him of an appeal, Colonel Manzi awarded Herbison the contract (Defendant's Exhibit J). [1] Immediately upon hearing of the District Director's ruling, and only hours after Colonel Manzi

awarded the contract to Herbison, plaintiff's counsel notified the Corps by phone that the size determination made by the SBA District Director would be appealed by plaintiff.

On March 10, 1982, plaintiff brought this action to enjoin the Corp and Herbison from proceeding under the contract. After hearing held on March 12, 1982, this Court entered a temporary restraining order in favor of plaintiff until such time as the appeal of the SBA District Director's determination could be ruled upon by the Size Appeal Board in Washington, D.C. An extension of the temporary restraining order was granted to plaintiff on March 19, 1982. On April 1, 1982, this Court entered a preliminary injunction in favor of plaintiff which was modified on April 12, 1982. On April 14, 1982, plaintiff filed a bond of $20,000.00 with the Clerk of Court

in accordance with the modified preliminary injunction.

Finally, on April 22, 1982, this Court received a mailgram from Claire C. Dondero, SBA Size Appeal Specialist. The mailgram states that the Size Appeal Board affirmed the appeal of Foley Construction Company and found that Herbison Construction Company was "other than small business for award of IFB DACW 25-82-B-0007." As a result of this reversal of the District Director's determination, the Court held a hearing on April 28, 1982 with all parties represented. At this hearing, plaintiff requested that the Court enter a permanent injunction against Herbison and the Corps and that Foley be awarded the contract. Defendants stated that the Size Appeal Board's ruling does not affect this cause and that defendants' motion to dismiss should be granted.

II. STANDING AND STANDARD OF REVIEW

The Court finds that plaintiff has standing to bring this action as it has alleged injury in fact and the alleged injury is arguably within the zone of interests to be protected or regulated by a statute that the agency is claimed to have violated. Sierra Club v. Morton, 405 U.S. 727, 733 (1972);Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1083-86 (6th Cir. 1975); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861-65 (D.C.Cir. 1970); John W. Danforth Co. v. Veterans Admin.,461 F.Supp. 10621069 (W.D.N.Y. 1978); Rudolph F. Matzee & Associates, Inc. v. Warner, 348 F.Supp. 991, 994 (M.D.Fla. 1972); W. B. Fishburn Cleaners, Inc. v. Army & Air Force Ex. Serv., 374 F.Supp. 162, 165 (N.D.Tex. 1974); 10 U.S.C. Sections 2301-2314; 5 U.S.C. Section 702; 15 U.S.C.

Sections 631-647.

Distinct from the question of standing is the question of the proper scope of judicial inquiry. Both parties agree that the standard applicable to this cause is that found in Sea-Land Services, Inc. v. Brown, 600 F.2d 429,434 (3d Cir. 1979), where the Court stated:

> The courts have the obligation to insure agency compliance with statutory and regulatory law. When jurisdiction is exercised in the field of governmental procurement, there are three interests that must be weighed: the practical considerations of efficient procurement of supplies for continuing government operation; the public interest in avoiding excessive costs, and the bidder's entitlement to fair treatment through agency adherence to statues and regulations. Judicial intervention in procurement disputes necessarily results in delay and the expenditure of funds on behalf of all parties, usually without measurable benefit to the public. Although much must depend on the circumstances, by and large, the courts have recognized the necessity of exercising restraint in interfering with procurement decisions and of recognizing a large measure of discretion in the contracting

officers. Consistent with this approach is the standard of review first articulated by the Court of Appeals for the District of Columbia Circuit in M. Steinthal & Co. v. Seamans, 147 U.S.App.D.C. 221, 455 F.2d 1289 (1971). That case held that Courts should not overturn any procurement determination unless the aggrieved bidder demonstrates there was no rational basis for the agency's decision. Even when that showing has been made, prudent judicial discretion may still refuse declaratory or injunctive relief because of overriding public interests. Id. at 233, 455 F.2d at 1301. Accord, Kinnett Diaries, Inc. v. Farrow, 580 F.2d 1260, 1270-71 (5th Cir. 1978). A showing of clear illegality is an appropriate standard to impose on an aggrieved bidder who seeks judicial relief.

The Court will now apply the "clear illegality" standard to the facts of the case at bar. To do this, the Court must examine the regulations which bind the actions of the contracting officer, Colonel Manzi. [2]

On December 15, 1981, the bids were opened. The Corps could not award the contract to the low bidder (Herbison) on

this day because Armed Services Procurement Regulation 1-703(5) requires a five-day waiting period. [3] On December 16, 1981, Foley filed a written protest. Colonel Manzi, the contracting officer, was required to forward this protest to the SBA district office serving the area in which the protested concern is located. Armed Services Procurement Regulation 1-703(b)(1)a. [4] Colonel Manzi testified that due to the holiday season, he was unable to forward the protest until January 1, 1982.

At this point, Federal Procurement Regulation 1-1.703-2(d) dictates what action is to be taken by the reviewing body, in this case, the District Director. That section states:

> SBA will, within 10 working days, if possible, after receipt of a protest, investigate and determine the small business status of the protested bidder or offeror and notify the

> contracting officer, the protestant, and the protested bidder or offeror of its final decision. Such decision is final unless appealed in accordance with paragraph (f) * * * and the procuring activity is notified of the appeal prior to award. If an award was made prior to the time the contracting officer receives notice of the appeal, the contract shall be presumed to be valid and any determination rendered shall be considered in future procurements.

The phrase "the contract shall be presumed to be valid" if awarded by the contracting officer before notice of appeal, has been interpreted by the Court of Claims to mean "deemed to be valid." Mid-West Construction, Ltd., 387 F.2d at 963.

Since here the protest has been forwarded to the District Director, the actions of the contracting officer are governed by Federal Procurement Regulation 1-1.703-2(e). That section states:

> Procurement action shall be suspended pending SBA's determination

or expiration of the 10-day period whichever is earlier, unless unusual conditions make it necessary that an award be made. If SBA's determination is not received by the contracting officer within 10 working days after SBA's receipt of the protest, the contracting officer shall ascertain when such determination can be expected. In cases where further delay in awarding the contract would be disadvantageous to the Government, it shall be presumed that the questioned bidder or offeror is a small business concern.

Foley filed its protest on December 16, 1981. The contracting officer herein, Colonel Manzi, however, did not declare that there was any type of emergency or that delay would be disadvantageous to the Government. In fact, at the hearing of March 25, 1982, Colonel Manzi testified that there was no public exigency and that he did not have to act with "great dispatch."

Because Colonel Manzi did not find "unusual conditions", all procurement action was properly suspended for ten days.

The required ten-day period expired on December 26, 1981 without a ruling being issued. [5] Defendants point out that Colonel Manzi did not award the contract on the eleventh day and that this shows a good faith attempt to permit Foley's claim to be heard. In fact, Colonel Manzi waited until he received the ruling of the District Director on February 22, 1982 before he awarded the contract to Herbison. The Court does not doubt that the actions taken by Colonel Manzi were in good faith. The Court would add, however, that they were the only actions which could have legally been taken by the contracting officer. The second sentence of 1-1.703-2(e) requires the contracting officer, after ten days, to contact the SBA body (in this case the district director) and inquire when a decision will be rendered. The contracting officer must then decide whether or not

further delay would be disadvantageous to the Government. If such delay would be disadvantageous, and the contracting officer so finds, there is a presumption that the bidder is a small business. This, of course, did not occur because Colonel Manzi made no finding that further delay would be disadvantageous to the Government. If delay would not be disadvantageous, the bidder could not be "presumed" to be a small business and the contracting officer must wait for a decision. This is exactly what Colonel Manzi did.

As mentioned earlier, on February 22, 1982, the District Director found Herbison to be a small business. On February 23, 1982, Colonel Manzi awarded the contract to Herbison, and on February 24, as soon as the decision was made known to Foley, an appeal was taken to the SBA Size Appeals Board in Washington, D.C. It is at this

point that the defendants state that Foley had its "bite of the apple". Defendants assert that after the District Director's determination and the awarding of the contract to Herbison, the validity of the contract could no longer be questioned, at least for purposes of an injunction, because the procurement statutes had been properly followed. The Court disagrees.

Clearly, Foley had the right to appeal the decision of the district director if done within five days, which he did. Small Business Admin. Reg. 121.3-6; Federal Procurement Reg. 1-1.703-2(f). However, before the expiration of the five-day appeal period, and even before Foley knew of the district director's decision, Colonel Manzi awarded the contract to Herbison. In light of the fact that Colonel Manzi had not, and from his own

assessment could not, declare an emergency, this action had no rational basis. [6] Further, the regulations require that once an appeal has been filed, the contracting officer must suspend further procurement action pending SBA's determination (in this case, the Size Appeal Board) or expiration of the ten-day period, whichever is earlier, unless unusual conditions make it necessary that an award be made. Federal Procurement Regs. 1-1.703-2(e). [7] Colonel Manzi testified that no such "unusual conditions" were present. Therefore, Colonel Manzi was under an obligation to suspend further procurement action until the Size Appeal Board ruled on Foley's appeal. Colonel Foley did not do so and his failure to do so violated the regulations, thus making his action clearly illegal and the contract with Herbison void.

In short, at either stage [8], Colonel Manzi had two choices. He could either: 1) wait for the decision of the ruling body or 2) make a determination that further delay would be disadvantageous to the Government. He did not do the latter; he was therefore obliged to wait for the decisions. He did not wait for the decision of the Size Appeal Board and therefore he violated the regulations.

Defendants contend that Federal Procurement Regulations 1-1.703-2(d) and 1-1.703-2(e) apply only to the District Director's determination and that there are no regulations that require the contracting officer to wait for the determination of the Size Appeal Board. Again, the Court must disagree. These sections do not distinguish between the various levels within the Small Business Administration, they simply refer to the "SBA" and the

"SBA's determination." The Court interprets that to mean that these sections apply to each and all levels of the Small Business Administration review process, not just the District Director's level. [9]

Assuming, arguendo, that the Federal Procurement Regulations are inapplicable to the case at bar, the Court finds that the outcome is the same under the Armed Services Procurement Regulations (ASPR).

ASPR Section 1-703(b)(3) states as follows:

> (3) Determination by SBA District Director. The SBA District Director will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of his determination, and award may be made on the basis of that determination. This determination is final unless it is appealed in accordance with (4) below, and the contracting officer is notified of the appeal prior to award. If an award was made prior to the time the contracting officer received notice of the appeal, the contract shall be presumed to be

valid. Action to be taken on SBA determinations shall be as follows:

(i) If the SBA District Director's determination is not received by the contracting officer 10 working days after SBA's initial receipt of a protest or notice questioning the Small Business status of a bidder or offeror, it shall be presumed that the questioned bidder or offeror is a small business concern. This presumption will not be used as a basis for making an award to the questioned bidder or offeror without first ascertaining when a size determination can be expected from SBA, and where practicable, waiting for such determination, unless further delay in award would bedisadvantageous to the Government.

(ii) If an appeal from the SBA District Director's determination is made, pursuant to (4) below, to the Chairman, Size Appeals Board, Small Business Administration, Washington, D.C. 20416, and the contracting officer is notified prior to award, an additional 20 working days (i.e., 30 working days inclusive from the time of initial receipt of the case in the SBA District Office) shall be allowed for receipt of the SBA size determination.

(iii) If the determination of the Chairman, Size Appeals Board, Small Business Administration, on the appeal is not received by the

> contracting officer within the 30 working day period, it shall be presumed that the SBA District Director's size determination has been sustained.
>
> (iv) Until receipt of the SBA determination of the size status, or expiration of the ten day period (30 days in case of an appeal to the Chairman, Size Appeals Board), whichever occurs first, contracting action shall be suspended; however, this suspension shall not apply to any urgent acquisition action which the contracting officer determines in writing must be awarded without delay to protect the public interest. The contracting officer's determination shall be placed in the contract file.

This regulation is in close accord with Federal Procurement Regulations 1-1.703-2(d) and (e). As stated above, if an award is made prior to the time the contracting officer receives notice of appeal, as occurred in this case, the contract shall be presumed to be valid. Despite this presumed validity, however, the contracting officer is required to suspend further contracting action for 30

days or until the SBA Size Appeals Board rules on the appeal unless the contracting officer determines, in writing, that it is an urgent acquisition which must be awarded without delay to protect the public interest. ASPR Section 1-703(b)(3)(iv). No such determination was made by Colonel Manzi in this case. Therefore, the failure to suspend further contracting action was a clear violation of Colonel Manzi's duty and the award, absent a finding of urgency, was not rationally based. The award and failure to suspend further contracting action were clearly illegal acts by Colonel Manzi. Any other interpretation of this section of the Armed Services Procurement Regulations would clearly violate the stated policy of the SBA as further discussed herein.

Having found the contract clearly illegal, the Court believes that it would

be appropriate to discuss the three interests articulated in Sea-Land Services, Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979).

The first interest is the practical considerations of efficient procurement of supplies for continuing government operations. This factor would include the effect on the project due to an appeal of an adverse size determination, as occurred in this case.

At the March 25, 1982 hearing, Vern Rosenberry, president of Foley Construction Company, testified that although the contract length for the levee project is 600 days, he believes his firm could do the work in 400 days. This statement stood unrefuted. Additionally, Michael Rukgaber, the City Engineer for the City of Burlington, testified that it is unlikely that any significant work could be done on

the project prior to May 7, 1982. This is the date that the flood stage of the Mississippi River will crest, which will bring river water up to, if not over, this construction site. When the water again drops below flood stage, hopefully around May 9-10, the immediate area will drain and work may commence. This testimony, also, went unrefuted.

Clearly, then, the evidence shows that the time of commencement of the contract has not been a crucial factor [10] and will not be such a factor until approximately May 9, 1982 because the City Engineer said no work could have been performed before this date either with or without the issuance of the temporary restraining order and preliminary injunction by the Court. (In point of fact, there has been no work done on the levee project by either Herbison or Foleyas of this date). [11]

The Court considers this fact crucial to the Court's determination herein. The cases cited by defendants in support of their motion to dismiss concern factual circumstances where the contracts in question were partially or totally completed at the time of the court action. [12]

Further, in two of those cases, there was a determination, or an assumption, that further delay would be disadvantageous to the Government. [13] Under these two cases, the practical consideration of efficient procurement of supplies for continuing government operations would weigh heavily in favor of permitting the erroneous [14] award to go forward. When, however, as here, no work has been started and there has been no finding by the contracting officer that further delay would be disadvantageous to the Government, the

Court believes that the practical consideration of efficient procurement must be balanced with the stated congressional purpose of the small business set-aside program. This purpose is stated in 15 U.S.C. Section 631:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government ... be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation. [15]

In this case, where delay of the contract has resulted in no harm to any party and a determination that the low bidder is not, in fact, a small business, the Court believes that the Congressional purpose of promoting small businesses

should take precedence. This factor, then, weighs heavily in favor of Foley.

The second interest to be considered is the public interest in avoiding excessive costs. It is undisputed that Foley's bid is approximately $30,000.00 higher than the bid of Herbison. This is neither surprising or unfair to the Government. The precise purpose of the Small Business Set-Aside Program is to allow a "small" business to be awarded certain Government contracts. Congress was aware that a "small" business could not realistically compete against a "big" business and that the result of awarding certain contracts only to "small" businesses would be some increased costs to the Government. [16] The Corps of Engineers, if required to accept the Foley bid, would get exactly what they asked for when they called for bids--the lowest

possible bid from a small business. The Court cannot find, under these circumstances, that an increase of 1.25% is "excessive." This factor does not mitigate against Foley.

The third and final factor is the bidder's entitlement to fair treatment through agency adherence to statutes and regulations. This fair treatment applies to both Foley and Herbison because both were "bidders." As previously stated, the Court finds that award of the contract to Herbison immediately after the ruling of the District Director, and before Foley was notified of the ruling, was not "fair." Further, the failure of Colonel Manzi to suspend all future action until the ruling of the Size Appeal Board [17] of the SBA was not only unfair, but illegal and in violation of the regulations. This factor, then, weighs heavily in favor of Foley.

In summary, the Court finds, after reviewing the case law and the regulations, that Colonel Manzi's action of awarding the contract and then not suspending future action when notified of Foley's appeal, when no finding of urgency was made, was not rationally based, was clearly illegal, [18]fundamentally unfair [19], and a clear violation of his duty. [20] This fact, combined with the ruling of the SBA's Size Appeal Board's finding that Herbison was not a small business, mandates that the award to Herbison be declared invalid and void and it is hereby set aside. See Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975).

III. REMEDY

Having found the contract with Herbison void, the question remains whether the Court should enter a permanent injunction in favor of Foley which would

prohibit the further execution of the Herbison contract and require the U. S. Army Corps of Engineers to award the contract to Foley. The alternative is to permit Foley to proceed on a claim for damages.

Although there is a split of authority, it is clear that an action for damages for the improper procurement of a small business set-aside contract will lie in this district. Iconco v. Jensen Construction Co., 622 F.2d 1291 (8th Cir. 1980). The question of whether injunctive relief is available, however, rests upon a determination of whether there is an adequate remedy at law and whether the moving party has shown irreparable harm. [21] The Court finds that, under the circumstances of this case, damages would not be an adequate remedy and irreparable harm would be sustained.

In the cases cited by defendant which permitted the aggrieved bidder to sue for damages, the availability of the damage remedy was not only adequate, it was the sole remedy because the non-small business had already commenced or completed the contract in question or the time factor was found to be crucial. [22] Several of the courts in those cases recognized that the underlying policy of the small business set-aside program was not being advanced by permitting the non-small business to remain a party to the contract. [23] Those courts further recognized, however, that due to the work already completed and the emergency nature of the work, it would be unrealistic to withdraw the contract from the non-small business and award it to a bona fide small business.

The facts in the case at bar are unique; work has not commenced on this

project and cannot commence until sometime after May 9, 1982. The SBA has already ruled that Herbison is not a small business. Under these circumstances, the Court does not feel that the underlying policy of the SBA--to award certain contracts only to small businesses--should be allowed to be defeated. No monetary award could right such a wrong.

Further, plaintiff argued at the March 12, 1982 hearing, without contradiction, that recovery of lost profits [24] would be of little aid to Foley. This is because the present construction economy, particularly for small businesses, is in a slump. Foley stated that without the cash flow provided by this contract, it is likely that the company would not survive because it needs this to keep its key employees on the payroll and a damage award for loss of profits in two or three years

would be welcome but wholly inadequate. [25] The Court finds this fact, combined with the advancement of the underlying policy of the SBA, makes recovery of damages for loss of profits an inadequate remedy at law and the Court further finds that plaintiff would be irreparably harmed if injunctive relief is not permitted. Injunctive relief is therefore proper and necessary under these circumstances. The U.S. Army Corps of Engineers and Herbison shall thereforebe permanently enjoined from further proceeding under the Herbison award.

The Court next turns to the issue of whether the Corps must rebid the contract or whether the Corps can simply award the contract to the next lower bidder--Foley Construction Company.

At the hearing of April 28, 1982, the Court requested the parties to submit

authority on this question. Neither party has provided the Court with authority on either side of the question.

The Court has examined the regulations and case law and determines that the contract can, and must, be awarded to Foley. An examination of the regulations shows that there is no regulation requiring the Corps to resubmit the contract. Further, the case law indicates that in comparable situations, the Government has simply awarded the contract to the next lowest bidder. [26]

Finally, under the circumstances of this case, the Court finds that an immediate award of the contract to Foley is necessary in the public interest. Sometime shortly after May 9, 1982, work can commence on this project. Delay beyond this date is likely to seriously jeopardize the likelihood of timely completion of this

project. Mr. Rukgaber, City Engineer for Burlington, testified that the levee was necessary for the physical safety of the people of Burlington. He also testified that delay would seriously affect the city financially due to commitments which it has already made in excess of $1,000,000.00. Additionally, the public interest of ensuring that agencies follow the regulations which control government contracting will be forwarded by an immediate award of the contract to Foley. [27] Foley has stated to the Court, in hearing and by letter, that it is ready, willing, and able to perform the contract as per its bid. The contract must be awarded to Foley under these circumstances.

To summarize, the Court finds that the policy of the Small Business set-aside program is to ensure that contracts, such as the one in this case, are awarded to

small businesses. This policy, and the applicable regulations, recognize that when time is a crucial factor, it is in the public interest to permit a non-small business to complete an erroneously awarded contract and limit the aggrieved bidder to an action for damages. [28] Absent such a circumstance, however, there is no need to disregard the underlying policy of the SBA and go blindly forward to the advantage of a non-small business. The regulations do not require such action,and this Court will not require such action to the detriment of the policy of SBA, the people of Burlington, and Foley Construction Company.

The Court recognizes that this is a very beneficial project for the City of Burlington that should promptly be commenced. The Court also recognizes that the Corps of Engineers has every right to appeal this decision. However, the Court

would respectfully suggest that the Corps of Engineers seriously consider permitting Foley to immediately commence the project while the seeking of a reversal of this Court's interpretation of the applicable law and regulations is on appeal [29] if the Corps believes it must proceed on appeal to prevent this ruling from establishing a precedent with which it cannot live.

IT IS THEREFORE ORDERED that defendants' motion to dismiss is hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for a permanent injunction is hereby granted; that the contract hearing officer has violated the Federal Procurement Regulation 1-1.703-2(e) and the Armed Services Procurement Regulation 1-703(b)(3); [30] that the contract is therefore void; and that the U. S. Army

Corps of Engineers is permanently enjoined from further proceeding under said contract and Herbison Construction Company is permanently enjoined from proceeding under said contract.

IT IS FURTHER ORDERED that the U. S. Army Corps of Engineers is ordered to withdraw the award of the contract to Herbison Construction Company and immediately make an award of the contract to Foley Construction Company under the terms of its bid and to cooperate fully with Foley Construction Company to expedite commencement of this project.

IT IS FURTHER ORDERED that the Herbison Construction Company may make application to this Court for reimbursement of legitimate expenses from the bond that has been posted.

Dated this 6th day of May, 1982.

/s/ Donald E. O'Brien

JUDGE, UNITED STATES DISTRICT COURT.

FOOTNOTES

*This is the supplemental order mentioned in this Court's Order of May 3, 1982.

[1] Colonel Manzi testified that he could have requestedan additional extension from Herbison of its bid, but he decided it was unnecessary due to the District Director's decision.

[2] The contract in question was awarded under the authority of the Armed Services Procurement Act of 1947 (10 U.S.C.S., Section 2301-2314), the Administrative Procedures Act (5 U.S.C.S., 551) and the Small Business Act (15 U.S.C.S., Section 631). These statutes are implemented by Procurement Regulations including the Federal Procurement Regulations (F.P.R.) 41 C.F.R., Section 1-1000, et seq., and the Armed Services Procurement Regulations (A.S.P.R.), 32 C.F.R., Sections 1.100, et seq. citing any authority, that the Federal Procurement Regulations may not be applicable to this case. The Court finds that these regulations do apply.

FPR Section 1-1.004, which was not cited by any party but which the Court believes deserves mention, states:

> The Federal Procurement Regulations apply to all Federal agencies to the extent specified in the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.), or in other law ... [E]xcept as directed by the President, Congress, or other authority, these regulations are not made mandatory on the Department of Defense. Therefore, the extent of their implementation within the Department of Defense and participation in the System will be determined by that Department....

The underlined portions to do not aid the defendant here because neither the Federal Property and Administrative Services Act of 1949 nor the Armed Services Procurement Regulations exclude application of the Federal Procurement Regulations. Further, in Allen M. Campbell Co. v. United States, 467 F.2d 931, 933 (Ct.Cl. 1972), a case relied upon by defendants, the Court applied Federal Procurement Regulation 1.703-2(e) to a small business set-aside contract let by the United States Air Force.

Under these circumstances, the Court finds that the Federal Procurement Regulations apply to the case at bar. As determined by the Court, however, it is irrelevant whether these regulations apply because the Court finds that the contracting officer violated both the Federal Procurement Regulations and the

Armed Services Procurement Regulations under the facts of this case.

[3] See also Small Business Adm. Reg. 121.3-6(3)(i).

[4] Small Business Administration Regulation 121.3-5(a) requires that the forwarding of the protest be done "promptly." The Armed Services Procurement Regulation does not contain the word "promptly." This is but one of many inconsistencies which permeate the regulations applicable to this case.

[5] The Court would note that as of December 26, 1981, the Foley protest had not yet been forwarded to the District Director. This delay was due solely to the actions of Colonel Manzi. Needless to say, there could have been no ruling on or before December 26, 1981 under these circumstances.

[6] John W. Danforth Co. v. Veterans Admin.,466 F.Supp. 1062, 1070 (W.D.N.Y. 1978).

[7] Armed Services Procurement Regulation 1-703(b)(3)(iv) is in basic accord with this section though there are conflicts between these sections.

[8] That is, at the stage of the protest to the District Director or at the stage of the appeal to the Size Appeal Board.

[9] In Mid-West Const., Ltd., v. United States, 387F.2d 957, n.10 (Ct.Cl. 1968), the Court stated:

It is significant that the Federal Procurement Regulations on protests as to small business status treat the SBA as a unit and do not distinguish between the layers of authority within that agency .... (W)hen paragraph (e) [of 1-1.703-2] refers to "SBA's determination" it means SBA as a whole.

[10] See Savini Construction Co. v. Crooks Brothers Construction Co., 540 F.2d 1355, 1359 (9th Cir. 1974).

[11] Excluding, of course, the transportation of equipment, by Herbison, from Minnesota to Iowa.

[12] Campbell v. United States, 467 F.2d 931, 933 (Ct.Cl. 1972); Savini Construction Co. v. Crooks Bros. Construction Co., 540 F.2d 1355, 1357 (9th Cir. 1974). The third case, Mid-West Construction, Ltd. v. United States, 387 F.2d 957, 958 (Ct.Cl. 1968), contained a statement by the contracting officer that "any further delay in the procurement action ... would be disadvantageous to the government." This did not occur in the case at bar.

[13] Savini Const. Co., 540 F.2d at n.4; Mid-WestConst., Ltd., 387 F.2d at 958.

[14] "Erroneous" in the sense that a non-small business would be permitted to go forward with the contract.

[15] See also Iconco v. Jensen Construction Co., 622 F.2d 1291, 1298 (8th Cir. 1980); Armed Services Procurement Regulations Section 1-702; 15 U.S.C. Section 644; 1953 U. S. Code Cong. & Admin. News, p. 2022

("Small business is the bulwark of free competitive enterprises.").

[16] Economics of scale would generally mandate such a result.

[17] Colonel Manzi could have, alternatively, declared that further delay would be disadvantageous to the Government. As has been repeatedly stated, this was not, and could not have been, done under these facts.

[18] Sea-Land Services, Inc. v. Brown, 600 F.2d 429, 434 (3d Cir. 1979).

[19] Allis-Chalmers Corp. v. Friedkin, 635 F.2d 248, 253 (3d Cir. 1980).

[20] M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1303 (D.C.Cir. 1971).

[21] Beacon Theatres v. Westover, 359 U.S. 500, 506-07 (1959)

[22] See Savini Construction Co. v. Crooks Brothers Construction Co., 540 F.2d 1355, 1356, 1359 (9th Cir. 1974); Allen M. Campbell Co. v. United States, 467 F.2d 931, 933 (Ct.Cl. 1972); Mid-West Construction, Ltd. v. United States, 387 F.2d 957, 966 (Ct.Cl. 1968); Rudolph F. Matzer & Assoc., Inc. v. Warner, 348 F.Supp. 991, 995 (M.D.Fla. 1972).

It is important to note that in the one case where an emergency was not found to be present, the Court set aside the award of the contract. John M. Danforth Co. v. Veterans Admin., 461 F.Supp. 1062, 1073 (N.D.N.Y. 1978).

[23] See Savini Construction Co. v. Crooks Brothers Construction Co., 540 F.2d 1355, 1358 (9th Cir. 1974); Mid-West Construction, Ltd. v. United States, 387 F.2d 957, 963 (Ct.Cl. 1968).

[24] It should be noted that the recovery of these profits would depend on Herbison's performance because the profits contemplated are those of Herbison, not the estimated profits of Foley.

[25] The earliest time that such recovery would be forthcoming would be after completion of the project because, until then, the profits of Herbison could not be determined. The project is scheduled to be completed on September 15, 1983. Construction Progress Chart submitted to Court by Joseph F. Manzi, Jr. on March 30, 1982.

[26] See Allis-Chalmers Corp. v. Friedkin, 635 F.2d 248, 252 (3d Cir. 1980) ("Allis-Chalmers must succeed on both of these claims if it is to have the lowest bid and hence the contract." (emphasis added)); Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1082 (6th Cir. 1975); Allen M. Campbell Co. v. United States, 467 F.2d 931, 932 (Ct.Cl. 1972) (Award first given to second low bidder and then to third low bidder).

[27] See Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1089 (6th Cir. 1975).

[28] M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1302 (D.C.Cir. 1971).

[29] See C. A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir. 1981), for the proposition that an appeal may be taken from only a part of a judgment.

[30] The Court's previous order of May 3, 1982 did not state that the contracting officer violated Armed Services Procurement Regulation 1-703(b)(3). The order of May 3, 1982 is hereby modified to include this finding.

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No. 83-998

In the Supreme Court of the United States

OCTOBER TERM, 1983

FOLEY CONSTRUCTION COMPANY, PETITIONER

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner, the prevailing party in a disappointed bidder's suit against the United States Army Corps of Engineers, contends that the courts below erred in denying its application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412, on the ground that the government's position in litigation was "substantially justified."

1. On November 10, 1981, the Army Corps of Engineers invited bids for construction of a levee along the Mississippi River in Burlington, Iowa. The bid invitation was issued pursuant to the Small Business Administration set-aside program, a program that encourages small firms to bid for federal contracts (see 10 U.S.C. 2301(b)). Herbison Construction Company was the low bidder, and petitioner was the second lowest bidder. Pet. App. 2-3, 35-36.

Petitioner filed a protest with the Corps' contracting officer, alleging that Herbison did not qualify as a small business. Pursuant to regulations, the contracting officer forwarded the protest to the SBA district office and suspended action on the contract. On February 22, 1982, the SBA district office ruled that Herbison was in fact a small business. On February 23, 1982, the day on which Herbison's bid would have expired if not accepted, the Corps awarded the contract to Herbison. Hours after the award, petitioner informed the Corps that it intended to appeal the decision of the SBA district office to the SBA Size Appeal Board in Washington, D.C. Pet. App. 3, 36-39.

On March 10, 1982, petitioner filed this action in the United States District Court for the Southern District of Iowa, seeking to enjoin the Corps and Herbison from proceeding under the contract. The Corps resisted the granting of injunctive relief on the ground that there was no likelihood of success on the merits since the contract had been awarded pursuant to valid procurement regulations.[1] The Corps also contended that under the Eighth Circuit's decision in *Iconco* v. *Jensen Construction Co.*, 622 F.2d 1291 (1980), petitioner had an adequate remedy at law in the form of a suit against Herbison for unjust enrichment and fraud in the event Herbison was determined not to be a small business. The district court nevertheless entered a temporary restraining order and, subsequently, a preliminary injunction barring the Corps from proceeding with the contract. Pet. App. 3-4, 39-40.

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[1]Both Army Procurement Regulations and Federal Procurement Regulations provide that if an award is made prior to the time the contracting officer receives notice of an appeal, "the contract awarded shall be presumed to be valid." 41 C.F.R. 1-1.703-2(d); 32 C.F.R. 1-703(b)(3).

On April 22, 1982, the SBA Size Appeal Board overruled the District Director and declared that Herbison did not qualify as a small business (Pet. App. 40). On May 7, 1982, the district court entered a permanent injunction against the Corps, ruling that the award of the contract to Herbison without waiting for an SBA Size Appeal Board determination constituted "clear illegality" (*id.* at 43-62). In an unprecedented step, the district court ordered the contract awarded to petitioner (*id.* at 67-68).[2]

2. Petitioner sought an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d). The district court denied the application, concluding that while the Corps had not prevailed in the lawsuit, its positions in the litigation had been "substantially justified" and, accordingly, no fees could be awarded under the Act (Pet. App. 31-34).

The court of appeals affirmed (Pet. App. 1-22). After noting (*id.* at 5) the purposes underlying enactment of the Equal Access to Justice Act, the court of appeals also acknowledged (Pet. App. 13) "the interest of the government and the public in a procurement process unfettered by delay." The court then found (*id.* at 14-19) that the Corps had acted reasonably in, inter alia, defending its initial award of the contract to Herbison and proceeding with the contract after it received notice that petitioner intended to appeal the decision of the SBA district office (see note 1, *supra*). The court of appeals concluded (Pet. App. 21) that "this is not the type of case to which the EAJA was intended to apply; there was no unreasonable government action involved."

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[2]Because the time that would have been consumed by an appeal would have postponed construction of the much needed levee, the government determined not to appeal the district court's judgment.

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

As petitioner acknowledges (Pet. 15-16, quoting S. Rep. 96-253, 96th Cong., 1st Sess. 6 (1979), and H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980)), "[t]he test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis in law and fact, no award will be made." The positions taken by the government in this case were all eminently reasonable. First, as the court of appeals held (Pet. App. 14-19), the Corps acted reasonably in relying on Federal Procurement Regulations and Armed Services Procurement Regulations for the proposition that, if an award is made after the SBA district office rules, but prior to the time the contracting officer receives notice of an appeal, "the contract shall be presumed to be valid." 41 C.F.R. 1-1.703-2(d); 32 C.F.R. 1-703(b)(3). Furthermore, a validly awarded contract that was advertised as a small business set-aside is not void merely because the company awarded the contract subsequently is determined by the Size Appeal Board not to qualify as a small business. *Allen M. Campbell Co.* v. *United States*, 467 F.2d 931 (Ct. Cl. 1972); *Mid-West Construction, Ltd.* v. *United States*, 387 F.2d 957, 959 (Ct. Cl. 1968). The Corps therefore was entirely justified in arguing that the district court should not grant equitable relief to petitioner because there had been no "clear illegality" in the award of the contract.

The Corps also was justified in arguing that petitioner was not entitled to equitable relief. Petitioner had an adequate remedy at law in the form of a suit against Herbison for unjust enrichment and fraud, see *Iconco* v. *Jensen Construction Co.*, *supra*, as well as a suit against the United States for bid preparation costs. *Cincinnati Electronics*

Corp. v. *Kleppe*, 509 F.2d 1080, 1089 (6th Cir. 1975); see also *Lincoln Services, Ltd.* v. *United States*, 678 F.2d 157, 158 (Ct. Cl. 1982). It therefore was reasonable for the Corps to assert that petitioner had not suffered irreparable harm, a prerequisite for injunctive relief.

Finally, the Corps was justified in resisting entry of a court order requiring award of the contract to Herbison. The overwhelming body of federal case law supports the position that even in the presence of "clear illegality" a company has no right to a federal contract. See, *e.g.*, *Sea-Land Service, Inc.* v. *Brown*, 600 F.2d 429, 432-433 (3d Cir. 1979); *Cincinnati Electronics Corp.* v. *Kleppe*, 509 F.2d at 1089; *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

Reduced to its essence, petitioner's contention is nothing more than an assertion that because the Corps did not prevail on the merits of the case, its position must have been unreasonable. Congress made clear, however, that "[t]he standard * * * should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." H.R. Rep. 96-1418, *supra*, at 11; S. Rep. 96-253, *supra*, at 7.[3]

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[3]Petitioner also raises as a question presented for review (Pet. 3) whether it was deprived of due process and equal protection "where it was denied an opportunity to appeal the Small Business Administration District Director's 'size determination' because the Corps of Engineers prematurely awarded a government construction contract prior to [petitioner's] receipt of the District Director's decision." But this question is not properly before the Court, since petitioner not only did appeal the decision of the District Director, but prevailed and ultimately was awarded the contract at issue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

DOJ-1984-03

No. 83-998

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REPLY TO MEMORANDUM OF RESPONDENTS IN OPPOSITION

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REPLY BRIEF

TO

MEMORANDUM FOR THE FEDERAL

RESPONDENTS IN OPPOSITION

This Reply Brief is filed with the United States Supreme Court pursuant to Rule 24.4 of the Rules of the United States Supreme Court.

The Solicitor General of the Department of Justice of the United States of America in his "Memorandum for the Federal Respondents in Opposition" to Petitioner's Petition for Writ of Certiorari from the decision of the United States Court of Appeals for the Eighth Circuit, filed March, 1984, incorrectly and misleadingly imputes and suggests that (1) Petitioner's argument inter alia before this court is that "the Government position was not substantially justified,"

simply because "it" lost the case. (Respondent's Mem. p. 5 par. 2) (Emphasis Added). The Solicitor General further mistakenly maintains that, (2) "Petitioner's contention is nothing more than an assertion that because the Corps did not prevail on the merits of the case, it's position must have been unreasonable" (Respondent's Mem. p. 5). Petitioner's argument before this Court cannot and should not be reduced to such simplistic phraseology.

I.

More accurately stated, Petitioner is seriously representing to this Court that there existed as a matter of fact and law "unreasonable Government action involved" which directly caused Petitioner to assume and be burdened with a costly prosecution of this case. True,

Petitioner ultimately prevailed, but Respondents did not endeavor to appeal that Order, and they therefore must accept it in spite of their statements contained in Memorandum suggesting that Petitioner was neither entitled to (1) equitable relief or (2) award of the Contract. (See Respondent's Memo. pp. 4-5).

The Petitioner herein submits to this Court that this case represents the very type of situation and scenario contemplated and specifically addressed by the Congress when it enacted the Equal Access to Justice Act, 28 U.S.C. (Supp V) 2412.

II.

Prior to and at the time of the award of the Contract in question, let by the Army Corps of Engineers February 23, 1982, Respondent had actual knowledge of

the fact that Petitioner had challenged and would continue to appeal the status and eligibility of Herbison Construction Company as a qualified and eligible bidder pursuant to the Small Business Administration Set-Aside Program; a program that encourages small business firms to bid for government contracts (See, 10 U.S.C. 2301(b)).

Petitioner made it expressly known as a matter of record at all times material hereto to the Respondent that Herbison Construction Company was a sham corporation and an alter ego of Park Construction Company, an ineligible bidder under the Small Business Set-Aside Program. The Size Appeals Board for the Small Business Administration, which constitutes the final administrative review forum in such matters,[1/] expressly affirmed

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1/ Midwest Construction Co. vs. United States 387 F. 2d at 960

Petitioner's position with respect to Herbison Construction Company on April 22, 1982 (Pet. Appx. 40).

On May 7, 1982, the United States District Court for the Southern District of Iowa entered a permanent injunction against the Corps and other Respondents ruling that the award of the Contract to Herbison without waiting for an SBA Size Appeal Board determination constituted "clear illegality". (Pet. Appx. at pp. 43-62 and Respon. Mem. p. 3). The District Court then awarded the contract to the Petitioner, who at the time of this writing continues to perform satisfactorily thereon.

III.

Of particular importance and significance in this appeal and a matter that has not been addressed by the Respondents

and has thus been ignored, are the undisputed and uncontroverted facts abundantly clear in the record which established that Respondent Corps had actual knowledge of Petitioner's documented challenge and appeal of Herbison's eligibility as a bidder at all times before, during and after the award of the Contract. Directly and defiantly in the face of all the known facts, the Corps steadfastly did nothing to preserve, maintain or support the "intent" of the Small Business Act, but rather chose to threaten Petitioner's attorney, a matter of record and unrebutted testimony of March 26, 1982, made on or about January 8, 1982, that if they (Petitioner) continued their protests and appeals, the Corps would make Petitioner "jump through the hoops". Unfortunately, Respondents were correct

in their assertion and their prophecy was self-fulfilling. Respondent with actual notice of these matters had thus unilaterally, completely and effectively frustrated the Petitioner's right to due process as well as participation in a bid the express purpose and congressional mandate for which the SBA Set-Aside Program was established.

Most regrettably for all concerned, Respondent Corps' actions were not only unreasonable but further demonstrated an arrogance and prejudice that clearly established an utter disregard of the legitimate public interest in this matter and a lack of good faith effort to protect or respect the legitimate interests and rights of the parties involved herein, not to mention the public interest expressly dictated and mandated by the Congress of the United

States of America.

IV.

Respondents tell us that according to the United States Court of Appeals for the Eighth Circuit that "the interest of the Government and the public in a procurement process unfettered by delay" is of some significance. (Respondent's Memo. p. 3). But the Respondents have totally overlooked and disregarded the unreasonable delay caused by a fraudulent and ineligible bidder and the resultant frustration of the Congressional mandate and public interest as manifested and expressed by the SBA Act. The District Court determined as a matter of record that the project could be performed by the Petitioner within the original project time scheduled, before issuing its injunction and awarding the contract to Petitioner.

(Pet. Appx. pp. 56-60). Accordingly, any delays occasioned by the Petitioner in this matter have been without significance or materiality.

A simple and undisputed fact is that Respondent Corps was put on notice as to Herbison's status as an ineligible bidder in a timely fashion by the petitioner. Respondent with this knowledge capriciously, arbitrarily and in willful defiance and by a belligerent course of conduct toward the Petitioner and public, and in violation of his procurement regulations as set forth in Petitioner's Petition for a Writ of Certiorari, (Pet. Writ Appx. p. 20) did not "declare an emergency" in writing, (Pet. Writ Cert. Pet. p.22), and did nothing in an endeavor to confirm or refute Petitioner's notice of appeal. Respondent did however "rush" to award the Contract to Herbison

on February 23, 1982 without investigation of Petitioner's claims and without notice to it. The Corps knew and had every reason to believe that Petitioner would pursue its appeal to the Size Appeals Board of the Small Business Administration in Washington, D.C. Respondent Corps' was obligated by law according to (its own) Procurement Regulations to declare in writing that an emergency existed prior to making the award or await final decision of SBA. (Pet. Appx. pp. 50, 51). There is nothing further in the record which would indicate as a matter of fact that an emergency existed and, accordingly, Respondent Corps' actions were unnecessary, precipitous and violated Procurement regulations.

V.

Apart from the above stated considerations involving the procurement process, the Corps at all times material hereto, before, during, and after the award had at it's immediate disposal and attention as a matter of record sufficient facts and information concerning the eligibility of Herbison as a qualified bidder. Any reasonable person with such knowledge would be put on both actual and constructive notice that the strong possibility, if not probability and likelihood, was, that Herbison was a sham corporation and an ineligible and unqualified bidder. The bid documents expressly required that each bidder must be qualified in all respects to perform the work. The Corps knew or should have known that Herbison had performed no construction work or engaged in any busi-

ness for several years prior to the letting in question, and that Herbison stated to the Corps its net worth at $65,000.00. Testimony adduced at the trial indicated, if not clearly demonstrated, that even Herbison's net worth was a serious inflated figure. The Corps remained doggedly on course and did nothing. There's not a Court of competent jurisdiction in this country that would not take judicial notice of the fact that a construction company with a net worth of $65,000.00 or less would be unable to perform a major multi-million dollar levee construction project on the Mississippi River, let alone meet its initial payroll obligations.

Had the Corps acted reasonably or in good faith, a simple phone call from the Corps to Herbison or a preliminary or

even cursory field audit, visit or investigation would have immediately disclosed these facts.

Testimony taken on March 26, 1982 in District Court of Mr. Olson, the alleged vice-president of Herbison, clearly disclosed the obvious sham and fraud perpetuated upon the Corps and public. A five minute phone call from the Corps would have elicited the same damning information. The Corps as a matter of record never made any attempt to explain its lack of attention or interest in these matters, or deliberate disregard thereof.

VI.

Petitioner respectively submits to the Supreme Court of the United States that the juxtaposition of stated facts, circumstances, conclusions and governing law would not support the conclusion that

Respondent's actions were reasonable, but rather that they constituted unreasonable and unjustified governmental action creating a nexus of facts and circumstances in fact and law for which Congress expressly provided that Petitioner is one to be included in a class of persons entitled to relief, restitution and redress under the Equal Access to Justice Act. See Photodata, Inc. v. Sawyer, 533 F. Supp. 348 (D.C.)

It should further be noted that although the various Circuit Courts have endeavored to interpret the Equal Access to Justice Act, administrative agencies continue to ignore this statute and deny restitution, and the Supreme Court has yet to hear a cause involving the Equal Access to Justice Act. At page 5 of Respondent's Memorandum, the following

statement is presented to this Court:

> "The overwhelming body of Federal case law supports the position that even in the presence of 'clear illegality' a company has no right to a federal contract."

However, the cases cited by Respondents involve factual situations wherein performance under these contracts had either already commenced, or, the facts did not warrant injunctive relief, or there was no finding by the Court of "clearly illegal" activity on the part of the Government. The Foley case is entirely distinguishable from those cited by Respondents. Only an "award" of the contract had been made, and no performance had commenced under the contract. The District Court determined that there would be no prejudice to the City of Burlington, Iowa, or the public if the project was awarded to the Peti-

tioner. (Pet. Appx. pp. 56-58). Furthermore, Respondents herein did not appeal that part of the Foley decision.

Respondents seem preoccupied with the Iconco v. Jensen Construction Co., case as somehow undermining the authority of the case at bar, Iconco v. Jensen Construction Co., 622 F. 2d 1291 (8th Cir. 1980). It should be noted, however, that Iconco, is a 1980 decision by the Eighth Circuit affirming Judge O'Brien's decision in the lower court. The same Judge O'Brien rejected the doctrine of Iconco in this case as failing to provide an adequate remedy at law (Pet. Appx. p. 63), and, thereafter, fashioned his decision in the Foley Construction Company case as one where irreparable harm would ensue.

Respondents cite several cases on page 5 of their Memorandum in Opposition

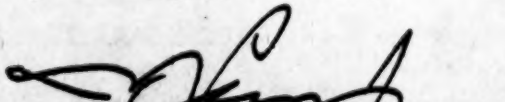
which purportedly stand for the proposition that Petitioner had no right to the contract even in the presence of "clear illegality". None of the cases stand for such a proposition and each is distinguishable on its facts. Each case can be read to support Petitioner's right to an award of the contract under its unique facts. Cincinnati Electronics Corp. v. Kleppe, 509 F. 2d at 934 comments in dicta:

> We emphasize that this case does not involve a situation where a dissatisfied bidder has persuaded a court to direct the procuring agency either to award a contract to that bidder or to cancel an award made to one another. In those circumstances the result might be different, but we intimate no opinion on that question at this time.

CONCLUSION

Reduced to its essence, Respondents' actions were neither reasonable or justified as a matter of fact and law; (the Petition for Writ of Certiorari should be granted) and an award of attorney fees should be made to the Petitioner herein.

Respectfully Submitted,



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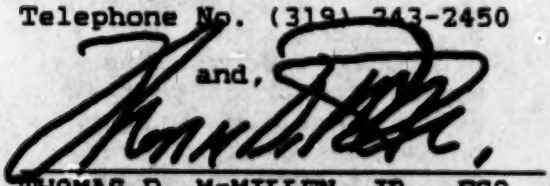

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CERTIFICATE OF SERVICE

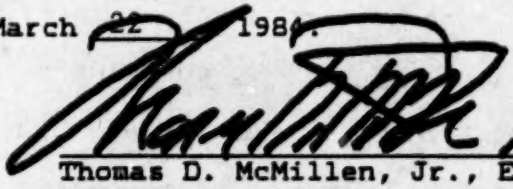
I, Thomas D. McMillen, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Foley Construction Company, Petitioner Herein, hereby certify that on March 22, 1984, pursuant to Rule 28.5(b), Rules of Supreme Court, I served three (3) copies of the attached Reply to Memorandum of Respondents in Opposition on each of the parties herein, as follows:

On the United States of America, Respondent herein, by depositing such copies with Federal Express, Clinton, Iowa, with tariff pre-paid, properly addressed to the post office address of the Solicitor General of the United States, Rex E. Lee, above-named Respon-

dents' counsel of record, at: Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated March 22, 1984.



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